No. 248.

Brief of Arnold for D. E.

IN THE

Supreme Court of the United States.

Filed Feb. 27, 1899.

MAUDE S. KIMBALL,
Plaintiff in Error,

vs.

HARRIET A. KIMBALL, JOHN S. JAMES and HARRIET P. JAMES,
Defendants in Error.

Argument for Defendants in Error.

LEMUEL H. ARNOLD,
For Defendants in Error.

O. G. Bunnell, Walker and Centre Streets, N. Y.

In the Supreme Court of the United States.

MAUD E. KIMBALL,
Plaintiff in Error,

AGAINST

HARRIET A. KIMBALL, JOHN S. JAMES and HARRIET I. JAMES,
Defendants in Error.

No. 248.
October Term, 1898.

ARGUMENT FOR DEFENDANTS IN ERROR.

Statement.

This case is brought here by writ of error to the Court of Appeals of the State of New York to review an order of that Court bearing date February 4, 1898, which is set forth in the printed transcript of record at page 73.

That order affirmed an order of the Appellate Division of the Supreme Court of that State, which will be found at page 67 of the printed record, and which in turn affirmed an order of the Surrogate's Court of the County of Kings of the same State, bearing date the 8th day of March, 1897, which appears at page 57 of the printed record. The order of the Surrogate's Court denied a motion made by the plaintiff in error for the revocation of letters of administration of the goods, &c., of Edward C. Kimball, deceased, granted by the Surrogate on the 10th day of November, 1896, to Harriet A. Kimball and John S. James,

two of the defendants in error, and denied her application that new letters of administration be issued to her as the widow of the deceased. No other question than the right of administration on Kimball's estate is raised by the moving papers.

Record, pp. 9, 10.

The defendants in error respectfully insist that the question as to the right of administration thus presented to and decided by the Surrogate's Court is not now a practical question, for the reason that the last will and testament of Kimball has been found since the letters of administration were granted and has been duly proved, and letters testamentary issued thereon, and that the letters of administration granted by the Surrogate to Mrs. Kimball and Mr. James were revoked by the Surrogate on his own motion in March, 1897, and are not now in force. A motion was made by the defendants in error to dismiss the writ of error herein, on that ground, and was submitted to this Court in March, 1898. This Court decided to postpone the hearing of the motion until the case came regularly on for argument on the calendar. The motion papers are now before the Court together with the briefs of counsel on the motion.

The facts bearing upon the merits of the case, as found by the Surrogate, on the evidence submitted to to him, are as follows:

Edward C. Kimball died in the City of Brooklyn on the 9th day of November, 1896, intestate leaving him surviving his mother Harriet A. Kimball and his sister Harriet I. James (two of the defendants in error) as his only next of kin, and on the 10th day of November, 1896, letters of administration on his estate were duly issued by the Surrogate of Kings County to Harriet A. Kimball and to John S. James (one of the defendants in error).

Surrogate's First Finding of Fact, Record, p. 55.

At that time no will of Kimball had been discovered. In point of fact he did leave a will which was found afterwards and duly proved before the Surrogate as above stated.

Kimball went through a marriage ceremony with the plaintiff in error in the City of Brooklyn on the 29th day of June, 1895.

Surrogate's 6th Finding of Fact, Record, p. 56.

They separated in January, 1896, and he was not living with her at the time of his death.

Record, pp. 3, 13.

Prior thereto, and on the 12th day of May, 1885, at the City of New York, the plaintiff in error had married one James L. Semon.

Surrogate's 2nd Finding of Fact, Record, p. 55.

The plaintiff in error left Semon and in June, 1890, went to the State of North Dakota, where in the month of September, 1890, she commenced an action in the District Court, 5th Judicial District, County of Barnes, for a divorce from her said husband.

Surrogate's 3rd Finding of Fact, Record, p. 55.

The said Semon was, and ever since his marriage to the plaintiff in error had been a resident of the State New York. *He was not served with the summons in the divorce suit in the State of North Dakota, nor did he appear in said suit in person or by attorney.* The summons was served upon him personally in the City of New York on the 15th day of October, 1890. Such proceedings were thereafter had in said suit that on the 26th day of January, 1891, the Court made a decree granting a divorce to the plaintiff in error from her said husband by default, and it appeared on the face of the decree that the summons was served upon Semon

in the City of New York, and that he did not appear in said suit nor serve any answer or demurrer to the complaint therein.

Surrogate's 4th Finding of Fact, Record, p. 55.

The plaintiff in error went to North Dakota on the 5th day of June, 1890, and stayed there until the 5th day of February, 1891, during which period the domicile of her husband was in the State of New York. *She went to North Dakota for the purpose of procuring a divorce from her husband on grounds not recognized by the laws of the State of New York as sufficient cause for granting a divorce.*

Surrogate's 5th Finding of Fact, Record, p. 56.

Kimball knew when he went through the marriage ceremony with the plaintiff in error that she was a divorced woman, but he had no knowledge as to the methods by which such divorce was obtained, nor did he know that it was invalid, nor did he know that Semon was then living but subsequently he ascertained that he was living.

Surrogate's 7th Finding of Fact, Record, p. 56.

After the death of Kimball and in December, 1896, Semon applied to the Court of North Dakota which granted the decree of divorce to have a letter which he sent to the plaintiff's attorneys after receiving the summons in the divorce action filed in said Court as his answer in the divorce suit *nunc pro tunc* as of the date of its receipt by the plaintiff's attorneys and to have said decree of divorce made on the 26th of January, 1891, as above stated, amended *nunc pro tunc* as of that date, by striking out the recital to the effect that the plaintiff failed to answer, demur or make any appearance in said divorce suit, and by inserting in place thereof the following words: "The defendant having

appeared herein and submitted himself to the jurisdiction of the Court." Notice of said application was given only to the attorneys who appeared for the plaintiff in the divorce suit in North Dakota, and an order was made by said Court on the 16th day of December, 1896, on the default of the plaintiff granting said application and purporting to amend said decree of divorce *nunc pro tunc* in accordance with said application, but said Court did not have the power or jurisdiction to make such an order.

Surrogate's 8th Finding of Fact, Record, p. 56.

On the foregoing facts the Surrogate made the following conclusions of law:

1st. The Court of North Dakota which granted the decree of divorce of the plaintiff in error from said James L. Semon did not acquire jurisdiction of said Semon in that action, and the decree of divorce made by said Court on the 26th day of January, 1891, was and is a nullity.

2d. The Court of North Dakota did not have jurisdiction to make the order of December 16, 1896, amending the said decree of divorce *nunc pro tunc*, and said order was and is a nullity.

3d. The said order of December 16th, 1896, was not and is not binding upon the defendants in error and did not in any way affect or impair their rights or interests as heirs and next of kin of Edward C. Kimball, deceased, in the real estate and personal property left by him.

4th. The plaintiff in error was when she entered into the marriage ceremony with said Kimball the wife of James L. Semon, and could not and did not contract a lawful marriage with said Kimball.

5th. The said plaintiff in error is not the widow of said Edward C. Kimball, deceased, and is not entitled as such widow to letters of administration on his estate.

6th. Harriet A. Kimball, mother of said Edward C. Kimball, deceased, and one of the next of kin of said deceased, was entitled to letters of administration on his estate, and to have John S. James joined with her in the administration of said estate.

Record, pages 56 & 57.

On this decision the Surrogate made his order of March 8th, 1897, denying the motion to revoke the letters of administration already issued by him, from which order the plaintiff in error appealed, as above stated. On the hearing before the Surrogate a copy of the judgment roll in the action brought by the plaintiff in error against her husband James L. Semon in the District Court of North Dakota for a divorce, together with a copy of the record of that Court on the application made to amend the original judgment, *were produced and admitted in evidence.*

Record, p. 45.

The plaintiff in error now alleges that the New York courts did not give full faith and credit to such judgments and proceedings of the District Court of North Dakota, and that for that reason a constitutional question is involved.

See Assignments of Error, Record, pp. 79, 80.

But the assignments of error do not conform to the rules and practice of this Court, and for that reason the plaintiff in error should not be heard.

As already stated, the question before the Surrogate, and decided by him, related to the right of the plaintiff in error to administer on Kimball's estate. There is no assignment of any error of law or fact committed by

the Surrogate in making the order appealed from. The first assignment of error is that the New York Court did not hold that the decree of divorce granted by the District Court of North Dakota to the plaintiff in error from Semon on the 26th of January, 1891, was a good and valid decree and was not void.

The second assignment of error is to the same effect, with the addition that it was binding upon the parties to this proceeding and that the Surrogate's Court erred in not so holding, and in not making a decree herein accordingly.

The third assignment of error is that the New York Courts erred in not holding that the decree of divorce, as amended *nunc pro tunc* in December, 1896, was not void, and in not making a decree herein accordingly.

The fourth assignment of error is that the New York courts erred in not holding that the recital and finding in said decree of divorce that the defendant appeared and answered in said action, and submitted himself to the jurisdiction of the Court, was an adjudication duly made by said Court, and that full faith and credit were not given to such adjudication.

The fifth assignment of error is that the New York courts erred in not holding that by the force and effect of said decree the plaintiff in error was not the wife of Semon when she married Kimball, and by such marriage she became the lawful wife of Kimball, and upon his decease she became his widow.

The sixth assignment of error is that the New York courts did not give full faith and credit to said decree of divorce, nor to the order amending the same, nor to the record and judicial proceedings in the divorce case.

There is nowhere found in the assignments of error any allegation showing why the decree of the Surrogate is erroneous. The power of the Surrogate to revoke the letters of administration is given by Section 2585 of the Code of Civil Procedure of New York, which reads as follows :

" In either of the following cases a creditor or person interested in the estate of a decedent may present to the Surrogate's Court from which letters were issued to an executor or administrator, a written petition, duly verified, praying for a decree revoking those letters, and that the executor or administrator may be cited to show cause why a decree should not be made accordingly. * * *

4. Where the grant of his letters was obtained by the false suggestion of a material fact."

It was under this section of the Code that the plaintiff in error moved to have the letters of administration granted to Mrs. Kimball and to Mr. James revoked.

See Petition, Record, p. 3.

There is no allegation in the assignments of error that the grant of letters was obtained by any false suggestion of any material fact. Nor is it alleged in what respect the order of the Surrogate was erroneous. The errors assigned relate generally to the failure of the New York Courts to recognize the validity and binding force of the judgment for divorce, but in what respects they erred or what rule of law they violated, is not alleged. Nor is it alleged in what respect that question arises in connection with the order of the Surrogate from which the appeal was taken. No question is therefore presented to this Court for its decision.

If, however, this Court shall decide to hear the plaintiff in error, then the defendants in error beg leave to submit the following points on the questions raised by the assignments of error.

ARGUMENT.

I.

The findings of fact of the learned Surrogate will be accepted and will not be reviewed by this Court.

St. Louis vs. Rutz, 138 U. S., 226.
Runkle vs. Burnham, 153 U. S., 216.
Egan vs. Hart, 165 U. S., 188.

By Section 9 of Article 6 of the Constitution of the State of New York as amended in 1894, it is provided that after the last day of December, 1895, the jurisdiction of the Court of Appeals * * * shall be limited to the review of questions of law. No unanimous decision of the Appellate Division of the Supreme Court, that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the Court shall be reviewed by the Court of Appeals.

Section 191 of the Code of Civil Procedure of the State of New York as amended in 1895, which limits the right to appeal from final orders or judgments, declares in the language of the Constitution that no unanimous decision of the Appellate Division of the Supreme Court that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the Court shall be reviewed by the Court of Appeals.

The findings of fact of the learned Surrogate were sustained by the unanimous decision of the Appellate Division of the Supreme Court.

Record p. 67.

They are therefore conclusive on appeal in the Court of Appeals as well as in this Court.

See Opinion of Judge Haight, Record p. 85.

II.

The domicile of both the plaintiff in error and Semon, her husband, was, when the former commenced her action for a divorce in the District Court of North Dakota, in the State of New York.

The Surrogate's finding in respect to Semon's residence at that time is as follows:

"The said James L. Semon is, and ever since his "marriage to the said petitioner has been, a resident of "the State of New York."

Fourth Finding of Fact, Record, p. 55.

In respect to the plaintiff in error the Surrogate finds:

"FIFTH. The said petitioner went to North Dakota on "the 5th day of June, 1890, and stayed there until the "5th of February, 1891. During that period the dom-"icile of her husband was in the State of New York. "The petitioner went to North Dakota *for the purpose "of procuring a divorce from her husband* on grounds "not recognized by the laws of the State of New York "as sufficient cause for granting a divorce."

Record, p. 55.

This last finding of fact of the learned Surrogate, even if it could be reviewed in this Court, is fully supported by the evidence.

The plaintiff in error married Semon in the State of New York on the 12th of May, 1885. He says in the letter hereinafter referred to that he lived there with her and their two children until September, 1888, when she ordered him from the house stating that she never wished to see him again.

Record, p. 40.

She admits that she went to North Dakota on the 5th of June, 1890.

Record, p. 55.

She was required to be in that State for ninety days next preceding the commencement of her action for a divorce.

Laws of North Dakota, Sec. 2578; Record, p. 49.

Almost immediately after the ninety days had expired she commenced the action. The summons was dated September 23, 1890.

Record, pp. 17 & 19.

The decree of divorce was entered in the Clerk's Office, January 29, 1891.

Record, pp. 15 & 16.

She admits that on the 5th day of February, 1891, she left the State of North Dakota.

Record, p. 55.

Although it does not appear where she went after leaving North Dakota, still it will be presumed that she returned to New York, where her mother resided (Record, p. 3), and, as she remained in North Dakota only long enough to procure her divorce, it will be inferred that she intended to obtain the divorce and then return to New York.

Reed vs. Reed, 52 Mich., 117. Opinion by Judge COOLEY.
Neff vs. Beauchamp, 74 Iowa, 92.
Com vs. Kendall (Mass.), 38 N. E. R., 504.

To acquire a new domicile there must be an actual change of residence and an intention of remaining permanently.

But in this case such an intention was wanting.

It is firmly settled that when a married woman goes to another State simply to procure a divorce and return, not intending a permanent change of residence, she does not acquire a new domicile.

Bishop on Marriages, D. & S., Vol. 11, Sec. 102-104.

Neff vs. Beauchamp, *supra.*
The State vs. Fleak, 54 Iowa, 429.
Colburn vs. Colburn, 70 Mich., 647.
Whitcomb vs. Whitcomb, 46 Iowa, 437.
Winship vs. Winship, 1 C. E. Green, 107.
Hall vs. Hall, 25 Wis., 600.
Webraham vs. Ludlow, 99 Mass., 587.
Brown vs. Ashbaugh, 40 How. Pr., 260.
Peralta vs. Peralta, 4 Col., 175.
Sewall vs. Sewall, 122 Mass., 156.

It is now well settled in North Dakota that the plaintiff in a divorce case must show that he or she has acquired a domicile there and that a mere residence even for ninety days is not sufficient to give the Court jurisdiction of the subject matter.

Smith vs. Smith, decided by Supreme Court of North Dakota, Apl. 29, 1898, and reported in 75 North Western R., 783.

It was held in Whitcomb vs. Whitcomb, 46 Iowa, 437, that a temporary residence selected with any other intention than that of making it a permanent domicile is not sufficient even if extended to the full length of time, whatever it may be, required by statute to give the Court jurisdiction of a proceeding for divorce.

III.

The record of the judgment of the Court of North Dakota could be contradicted as to the facts necessary to give the Court jurisdiction, and, if it was shown that such facts did not exist, the record is a nullity, notwithstanding it may recite that they did exist.

Thompson vs. Whitmore, 18 Wall., 457.
Reed vs. Reed, *supra.*
Neff vs. Beauchamp, *supra.*
Com vs. Kendall, *supra*
Adams vs. Adams, 154 Mass., 290.

There is no finding by the Court of North Dakota that the domicile of the plaintiff in error was in that State. All that appears in the record of that Court on that subject is the recital in the decree that " the plaintiff was a resident of Barnes County and State of North Dakota at the commencement of this action and had been for more than 90 days next preceding."

Record, pp. 15 to 26.

In Smith vs. Smith, *supra* (North Dakota case), the Court says:

"The statute requiring residence, which means " domicile for a period of ninety days as preliminary " for starting an action for divorce, *is jurisdictional to* " *the subject matter.* Until this preliminary proof is " made the trial Court obtains no authority to move in " the action. Until this prerequisite is made no law- " ful service of a summons can be made. The Court " itself is in duty bound to see that its own jurisdiction " exists, and for that purpose it should scrutinize the " proof offered on this question with painstaking " fidelity. In a divorce case the sovereign state is " always present as a party in the action, not techni- " cally but actually and potentially a party. The " State represented by the Court is there to see to it " that no mere transient inhabitant whose domicile is " elsewhere shall call upon the Courts of this State to " adjudicate upon the marital relations of citizens of " other states or nations. To do so would not only be " without results except as a purely local affair, but " would be a gross violation of the comity of states and " one directly calculated to make social and " domestic discord and unhappiness to the innocent " parties directly concerned in its action. *The proof* " *of jurisdictional facts should be clear and convincing.* " In the case at bar it falls far short of this."

If the rule laid down in this late case had been followed in the Semon case, the plaintiff in error would doubtless have shown it by the record. She failed to

show that any proof whatever was taken by the Court of North Dakota on the subject of her domicile. Even if the recital in the decree as to her residence was *prima facie* sufficient to show jurisdiction of the Court, it has been contradicted by the facts proved before the Surrogate, which established that her domicile was never changed from New York to North Dakota.

IV.

The judgment of divorce granted to the plaintiff in error from Semon, her husband, by the District of North Dakota, on the 26th of January, 1891, was void, outside of that State, for want of jurisdiction.

1. As to the subject matter :

It is held by numerous cases and may be regarded as settled law that a decree of divorce, granted by the Courts of a State in which neither of the parties was domiciled, is, beyond the limits of such state, a nullity.

Smith vs. Smith, *supra.*
Van Fossen vs. S., 37 Ohio State Reports, 317.
Sewall vs. Sewall, 122 Mass., 156.
Hoffman vs. Hoffman, 46 N. Y., 30.
Hood vs. The State, 56 Indiana, 263.
People vs. McDowell, 25 Mich., 247.
Litowick vs. Litowick, 19 Kansas, 451.

Judge PECKHAM said in Hoffman vs. Hoffman, *supra* :

" For the reason, therefore, that the Court of Indiana " had no jurisdiction of the subject of the action as the " plaintiff in that action was in fact a resident of this " State at the time he claimed to have resided there, " and went to Indiana only to obtain this decree, and " the defendant therein was during all the time a resi- " dent of this State, was never served with process or

" appeared in that action, the decree therein cannot be " enforced here but must be held void."

2. As to the parties:

Irrespective of the question of domicile of the parties, the District Court of North Dakota never acquired jurisdiction of the defendant Semon.

Semon was served with the summons in the State of New York. He was never served in the State of North Dakota, nor did he appear in the action in person or by attorney. Judgment was taken against him by default.

See Original Decree of Divorce, Record, p. 14.

The law of New York has always been that in such a case a judgment of divorce of a Court of another State is null and void for want of jurisdiction, and can be attacked collaterally in the courts of New York.

See Atherton vs. Atherton, 155 N. Y. R., 129, and earlier cases therein cited.

There is no conflict between the decisions of the Courts of New York and of this Court on this subject.

The case in this Court most frequently quoted in this connection in the State Courts is that of Pennoyer vs. Neff, 95 U. S. R., 14. That case is commented on and shown to be consistent with the New York cases, by Judge FOLGER in The People vs. Baker, 76 N. Y. R., 78.

The later cases of Maynard vs. Hill, 125 U. S. R., 190, and Cheely vs. Clayton, 110 U. S. R., 701, are cited in the opinion of Judge BROWN, in Williams vs. Williams, 130 N. Y. R., 193, who says that they do not overturn the decisions of the State of New York, but are in harmony with them.

The point now raised does not seem to have been decided by the United States Courts.

In Laing vs. Rigney, 160 U. S. R., 531, *defendant appeared and answered*, and thereafter a supplemental

bill was filed on which the Chancellor proceeded with the case and rendered judgment without service of a new subpœna within the State, or on the voluntary appearance of the defendant *after* the supplemental complaint was filed. A lawyer testified that in his opinion the Chancellor did not have jurisdiction. This Court held that in the absence of statutory direction or reported decision to the contrary this Court must find the law of New Jersey applicable to the case in the decree of the Chancellor, and that the opinion of an expert could not control the judgment of the Court in this respect, and that the evidence of the defendant did not avail to show want of jurisdiction on the part of the Chancery Court of New Jersey.

It was held in a late case by the Circuit Court of Appeals that an amended personal judgment for alimony allowed in a decree of divorce obtained by default where the defendant was not served with process in the State, and did not appear in the action, could not be enforced in the United States Courts in an action brought for that purpose even when the defendant, relying upon the divorce, had married again, but before the amended judgment was made.

Hikking vs. Plaff, U. S. Circuit Court of Appeals, First Circuit, Opinion not yet reported, but a printed copy is herewith submitted.

Reported below in 82 Federal R., 403.

It has been held by some Courts that a judgment of divorce, obtained without service of process on a non-resident defendant within the State and without his appearance in the case, fixed the marital status of the plaintiff, and that the Courts of other States were bound to recognize such judgments as not only fixing the status of the plaintiff but also that of the defendant as divorced persons, even though the defendant was never subject to the laws of the State in which the divorce was granted.

See Ditson vs. Ditson, 4 R. I., 87.

The better and prevailing opinion seems to be that adopted by the Courts of New York to the effect that such judgments are void outside of the State in which the divorce was obtained, and that each State can determine for itself what the marital condition or status of the parties in such cases shall be so long as they are domiciled within the jurisdiction of its laws. In Dunham vs. Dunham, 57 Ill. Ap., 475, the Court said: "The marriage state is a condition or status. So also "is minority. citizenship, freedom, bondage. These "are each conditions of the individual depending for "their existence upon the laws of the territory in "which the individual is domiciled.

In Strader vs. Graham, 10 How. (U. S.), 82, 93–4, the Court said: "Every state has an undoubted right "to determine the status or domestic and social con- "dition of the persons domiciled within its territory "except in so far as the powers of the states in this "respect are restrained or duties and obligations "imposed upon them by the Constitution of the United "States. There is nothing in the Constitution of the "United States that can in any degree control the law "of Kentucky upon this subject, and the condition of "the negroes, therefore, as to freedom or slavery "after their return, depended altogether upon the law "of that State, and could not be influenced by the laws "of Ohio. It was exclusively in the power of Ken- "tucky to determine for itself whether their employ- "ment in another State should or should not make "them free on their return. The Court of Appeals "have determined that by the laws of the State they "continued to be slaves, and their judgment upon "this point is, upon this writ of error, conclusive upon "this Court and we have no jurisdiction over it."

See also Cheever vs. Wilson, 9 Wall., 108.

It follows, therefore, that the Courts of New York had the exclusive jurisdiction to fix the status of Semon, as the husband of the plaintiff in error, as they

have done in this case, and that the Courts of North Dakota had no power over his status, whatever their power may have been to fix the status of the plaintiff in error in that State.

Prosser vs. Warner, 47 Vt. R., 667.
Thorn vs. Salmonson, 37 Kan., 441.
Cook vs. Cook, 56 Wis., 195.
Irby vs. Wilson, 1 Dev. & B., 568.
Culver vs. Reed, 55 Penn., 375.
Reed vs. Reed, 52 Mich., 117.
Doughty vs. Doughty, 27 N. J. Eq., 315; s. c., 28 N. J. Eq.; 581.
Hunt vs. Hunt, 72 N. Y., R., 217.
Dunham vs. Dunham, *supra.*

3. The affidavit on which the order was made for the service of the summons on the defendant in the divorce case by publication failed to show what diligence, if any, was used to serve the defendant within the State of North Dakota. The statute is not satisfied by the formal allegations in the affidavit that the defendant cannot, after due diligence, be found in the State (see Affidavit of Winterer, Record, p. 20). The Supreme Court of North Dakota has held that a judgment founded on such insufficient service is void.

Beach vs. Beach, 43 N. W. Rep., 701.
Yorke vs. Yorke, 55 N. W. Rep., 1095.

V.

The attempt of the plaintiff in error to cure the jurisdictional defect in the judgment of divorce, by obtaining an amendment thereof, *nunc pro tunc*, was ineffectual.

It should be borne in mind that the original decree of divorce was dated January 26, 1891; that the plaintiff in error went through a marriage ceremony with Kim-

ball in New York in June, 1895; that Kimball died on the 9th of November, 1896; that letters of administration on his estate were issued to Mrs. Kimball, and to Mr. James, on the 10th of November, 1896, and that afterwards, and in December, 1896, nearly six years after the entry of the judgment of divorce, an application, ostensibly on behalf of Semon, was made to the District Court of North Dakota for an order directing that a copy of a certain verified *letter*, alleged by Semon to have been sent by him to the plaintiff's attorneys just after the service of the summons and complaint upon him in 1891, be filed, *nunc pro tunc*, as of Januaay 26, 1891, and also amending the judgment in the divorce suit *nunc pro tunc* as of the same date, so that it should recite that the defendant James L. Semon had appeared at that time in the suit, and had answered and submitted himself to the jurisdiction of the Court, and by striking out from the judgment the recital that he had made default.

This application was based upon a petition of Semon, upon which the District Court made an order requiring the plaintiff in error, or her attorneys, to show cause why the prayer of the petition should not be granted. The petition stated that Semon, "desir-" ing to appear in said action, and to answer said com-" plaint as required by said summons, did prepare, " make and sign his answer to the said complaint, and " did subscribe and swear to the same, and did serve " the same by mail on the plaintiff's attorneys, Win-" terer & Winterer; that he prepared and sent said an-" swer without aid or advice, and without consultation " with any counsellor or attorney at law, to avoid the " expense thereof;" that he "intended said answer to " be filed in court as part of the proceedings in said " divorce suit, but had recently learned that this had " not been done, but that judgment had been entered " against him by default." Annexed to this petition was what was stated to be a copy of the "Answer" (Record, p. 40). It is marked "A" and is in the form

of a letter addressed to Herman Winterer, and purports to be sworn to. It denies the plaintiff's allegations of desertion, non-support and intemperance. The original of this letter was not produced, but Herman Winterer made affidavit, on December 11th, 1896, that the Exhibit A annexed to Semon's petition *is a true and correct copy of the original received by him on or about October 28th, 1890, more than six years before; and that the original cannot be found, but was either lost or destroyed.* He further swears that the original letter was not filed with the records in the divorce suit, because *it was not in the form of a pleading under the requirements of the statute of the State of North Dakota* (Record, p. 33). It is a noticeable fact that this letter was addressed to Herman Winterer, although there was nothing in the papers that were served on Semon to inform him, at the time he alleges that he wrote and sent the letter, that there was such a person as Herman Winterer. The summons required an answer to be served on " Winterer & Winterer " (Record, p. 16).

Upon this application, and without notice to any one other than the lawyers who about six years before had appeared as the attorneys for the plaintiff in error, the Court made an order, dated December 16, 1896, granting the prayer of the petition and ordering " the copy of defendant's letter, dated October 23, 1890, directed to Herman Winterer," to be filed in said divorce suit as of the date of its receipt, and the decree of January 26, 1891, to be amended *nunc pro tunc* as of that date, by striking out the recitals of the defendant's default, and by inserting in their place, " the defendant having appeared herein and answered and submitted himself to the jurisdiction of the Court." No one appeared on the motion for the plaintiff in error.

See Order, Record, p. 32.

The very next day after the entry of this order in North Dakota the plaintiff in error presented her petition to the Surrogate's Court of the County of Kings,

alleging that she was the widow of Kimball; that the letters of administration theretofore granted to Mrs. Kimball and Mr. James were granted upon a deliberately false statement that the deceased was "unmarried at the time of his death and left him surviving no widow," and praying that those letters be revoked, and that letters of administration be issued to her as the widow of the deceased.

Record pp. 32–43.

Upon this state of facts the Surrogate, who evidently did not believe the story, found as matter of fact that Semon had not appeared in the divorce suit.

Surrogate's 4th Finding of Fact, Record p. 55.

See Kerr vs. Kerr, 41 N. Y. R., 272.

The Eighth Finding of the Surrogate is in no respect in conflict with the former finding of non-appearance; it is merely a statement as to the character of the application subsequently made by Semon to the Dakota Court, namely, "that the said James L. Se-"mon applied to the Court of North Dakota which "granted the decree of divorce to have a letter which "he sent to the plaintiff's attorneys * * * filed in "said Court as his answer." This is not a finding that such a letter was actually sent by Semon, but only that he made an application to the Court to have a copy of a letter, which in his petition in that application he stated he had sent, placed on file, etc. The Surrogate was evidently convinced that no such letter was sent at the time alleged, and that the whole story was an afterthought fabricated by Semon and his wife to bolster up her application for letters of administration and to enable her to get Kimball's property. This was also the view taken by the Appellate Division of the Supreme Court. Presiding Justice GOODRICH, in his opinion, says:

"It is, at least, a very curious suggestive coinci-"dence that as soon as the validity of the appellant's

" divorce had been practically attacked by the granting
" of letters of administration to the next of kin, the
" former husband of the appellant at once applied for
" an amendment of the decree which adjudged him
" guilty of moral obliquity in failing to discharge his
" marital obligations, not for the purpose of having it
" vacated and being relieved from the imputation which
" it carried, but to give life and force to the charges
" against himself, and for this purpose submit himself
" to the jurisdiction of the Court and assent to the
" judgment. The story of his appearance and answer
" is apocryphal and challenges credulity, and the Sur-
" rogate appears to have been of this opinion."

Record, p. 69.

If the question of the non-appearance of Semon in the divorce suit is one of fact, then the question is a closed one in this Court because the finding of the trial Court is conclusive and this Court will not review it.

See cases cited under Point I.

If it is a question of law, and as such can be examined in this Court, then the answer to it is found in the learned opinion of Judge HAIGHT of the Court of Appeals.

Record, p. 82.

VI.

But the relief to which Semon was entitled, if his story can be believed, would not allow the judgment to be amended *nunc pro tunc*.

" It must be observed that the entire purpose of en-
" tering judgments and decrees as of some prior date
" is to supply matters of evidence, and not

"to supply or modify matters of fact. The failure "of a Court to act or its incorrect action can never "authorize a *nunc pro tunc* entry. If a Court does "not render judgment, or renders one which is imper- "fect or improper, it has *no power* to remedy any of "these errors or omissions by treating them as clerical "misprisions."

Freeman on Judgments, 4th Edit., Sec. 68.
Gray vs. Brignardello, 1 Wall., 627, 636.
Mitchell vs. Overman, 103 U. S., 62, & cases cited in note at page 66.
Cassidy vs. Woodward, 77 Iowa, 354.
Woolridge vs. Quinn, 70 Mo., 370.
Garrison vs. People, &c., 6 Neb., 274.

If it be conceded that Semon had really served an answer which had been suppressed, it is clear *that he had not at that time waived his right to insist upon his defense, and to have the issues in the suit regularly tried;* such a waiver was not even impliedly made before December, 1896, and the amendment purporting to adjudge in effect that he had waived his rights in this respect at the time the original judgment was entered in January, 1891, is contrary to the facts as they then existed, does not express the truth and was beyond the power of any Court to make. All that Semon was entitled to under any circumstances, upon his own statement, was to have the judgment against him vacated and to be heard in his own defense.

Yorke vs. Yorke *(supra).*

The Code of North Dakota of 1895 contains the following provisions (Record, p. 51):

Sec. 5415. Origin and classes of issues.

Issues arise upon the pleadings when a fact or conclusion of law is maintained by one party and controverted by the other. There are two kinds:

1. Of law.
2. Of fact.

Sec. 5417. Of fact classified.

The issue of fact arises upon the material allegations of the complaint controverted by the answer.

Sec. 5419. Trial defined. A trial is the judicial examination of the issues between the parties whether they are issues of law or of fact.

Sec. 5421. Issues of fact—how tried. All issues of fact triable by a jury or by a Court must be tried before a single Judge. Issues of fact must be tried at a regular term of the District Court when the trial is by jury, otherwise at a regular or Special Term as the Court may by its rules prescribe.

Sec. 5422. Note of issue, &c. {At any time after issue, and at least ten days before the Court either party may give notice of trial. The party giving the notice shall furnish the Clerk at least eight days before the Court with a note of the issue containing the title of the action, &c.

Sec. 5423. Either party proceeds, &c.

Either party, when the case is reached upon the calendar and in the absence of the adverse party, unless the Court, for good cause, shall otherwise direct, may proceed with his case and take a dismissal of the complaint or a verdict or judgment, as the case may require.

Sec. 5479. Judgment may be entered by the Clerk on order.

Judgment upon issue of law or fact or upon confession, or upon failure to answer, may be entered by the Clerk upon order of the Court or of a Judge thereof.

Sec. 5480. Prescribes that notice of entry of judgment shall be served on the adverse party.

Sec. 5489. Prescribes what the judgment roll shall contain.

Record, pp. 52, 53.

Whatever judgment was obtained by either party could have taken effect only from the time of its actual entry, which could not have been earlier than Decem-

ber, 1896, after Kimball had died, and letters of administration on his estate had been granted.

VII.

The Court had no power to make the amended decree for another reason.

Section 2744 of the Revised Code of North Dakota of 1895, provides that a divorce must be denied on showing collusion, and Section 2746 provides that "Collusion is an agreement between husband and wife "that one of them shall commit, or appear to have "committed, or to be represented in Court as having "committed acts constituting a cause of divorce for "the purpose of enabling the other to obtain di-"vorce."

Record, p. 48.

The object of making the application to amend the decree of divorce was stated in Semon's petition to be to give the decree validity outside of North Dakota so as to enable him to marry again.

Record, p. 57.

He admitted the invalidity of the original decree (Record, p. 37), and by waiving his right to try the issues of fact raised by his so-called answer, he impliedly admitted the allegations in the complaint charging him with acts constituting a cause for divorce in North Dakota. If this were not so, the Court could not, of course, without a trial, have found the facts on which the amended decree rested.

This seems to have been a clear attempt on Semon's part to be "represented in Court as having committed "acts constituting a cause for divorce, for the purpose

" of enabling the other to obtain a divorce," and it was the duty of the Court under Section 2744 to deny the application, and as the question is one which relates to the power of the Court it can be raised in this case.

VIII.

The North Dakota Court had not the power to amend its judgment so as to affect or impair the rights of the defendants in error which accrued prior to the date when the order amending the judgment was made.

The defendants in error have shown that the original judgment of divorce was invalid for want of jurisdiction. Before an attempt had been made to give it validity by the application to amend it, Kimball had died and Mrs. Kimball, his mother, and Mrs. James, his sister, as his only heirs at law and next of kin, had become vested with the right of inheritance, and had entered into possession of his property. Mrs. Kimball and Mr. James, as administrators of his estate, had entered upon the discharge of their duties, exercising the powers and incurring the liabilities incident to that office.

Notice of the application to amend the decree was not given to either of them nor did they have an opportunity to be heard. The amendment which was sought to be made was not one to correct a mistake in a case where the Court had full jurisdiction. As already stated, it was an attempt to give jurisdiction to the Court after rights of third parties had intervened.

Whatever the effect of the amendment may be as between Semon and the plaintiff in error it could not de-

stroy or take away the rights of property of the defendants in error.

Ex parte Buskirk, 72 Fed. R., 14.
Weeks vs. Jones, 16 Hun, 349; Affd. 76 N. Y., 601.
Vroom vs. Ditmas, 5 Paige, Ch. R., 528.
Koch vs. Atlantic, &c., R., 77 Mo. R., 354.
Acklen vs. Acklen, 45 Ala. R., 609.
Jordan vs. Petty, 5 Fla. R., 326.
McCormick vs. Wheeler, 36 Ill., 114.
Small vs. Donthitt, 1 Kan. R., 335.
Graham vs. Lynn, 4 B. Mon. (Ky.), 18.
Galpin vs. Fishburne, 3 McCord (S. C.), 22.
Hays vs. Miller, 1 Wash. Ty., 143.
Hekking vs. Plaff, *supra.*
Smith vs. Hood, 25 Pa. St., 218.
See, also, cases cited in 20 Lawyers' Rep. An., 146, note.

The power of the Courts of North Dakota to amend judgments is very similar to that possessed by the Courts of New York.

Code of North Dakota, Sec. 4938 (Record, p. 51), is as follows:

SEC. 4938. The Court may, before or after judgment, in furtherance of justice and on such terms as may be proper, amend any pleading, process or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense by conforming the pleading or proceeding to the facts proved.

Civil Code of Procedure of New York, Sec. 723, is as follows:

The Court may, upon the trial, or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, amend any process, pleading or other proceeding by adding or striking out the name of a person as a party,

or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting an allegation material to the case; or where the amendment does not change substantially the claim or defense by conforming the pleading or other proceeding to the facts proved. And, in every stage of the action, the Court must disregard an error or defect, in the pleadings or other proceedings, which does not affect the substantial rights of the adverse party.

It is well settled by the New York cases that such an amendment as the Court of North Dakota made could not affect or impair rights which had accrued prior to the amendment.

Weeks vs. Jones, *supra*.
Bank of Rochester vs. Emerson, 10 Paige, 359.
Stuart vs. Palmer, 74 N. Y., 183.
Butler vs. Lewis, 10 Wend., 541.
Davis vs. Morris, 21 Barb., 152.
Boyden vs. Johnson, 11 How. Pr., 503.
Johnson vs. Fellerman, 13 How. Pr., 21.
Van Beck vs. Shuman, 13 How. Pr., 472.
Allen vs. Smillie, 12 How. Pr., 156.
Buchan vs. Sumner, 2 Barb. Ch., 165.
McKee vs. Tyson, and note, 10 Abb. Pr., 392.
Lawless vs. Hackett, 16 Johnson, 149.
Hammond vs. Rush, 8 Abb. Pr., 152.
Roberge vs. Winnie, 75 Hun., 597.
Rockwell vs. Carpenter, 25 Hun, 529, see Opinion of BOARDMAN, J., at page 535.
Cook vs. Whipple, 55 N. Y., 150.
Symson vs. Selheimer, 105 N. Y., 620 and 660.

IX.

Neither the constitutional provision that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other

State, nor the Act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the Court by which a judgment offered in evidence was rendered: and want of jurisdiction may always be interposed by third parties against a judgment when it is sought to be enforced or when any benefit is claimed from or under it.

Thompson vs. Whitmore, 18 Wall., 456.
Simmons vs. Saul, 138 U. S., 439.

X.

If the foregoing points are well taken it follows:

1st, That the District Court of North Dakota did not have jurisdiction to make the original judgment of divorce or the amended judgment, and that the Courts of New York did not err by refusing to recognize such judgments as dissolving the marriage relation between the plaintiff in error and Semon in the State of New York.

2d That the plaintiff in error was Semon's wife when she entered into the marriage ceremony with Kimball, and that that ceremony did not make her Kimball's wife.

3rd. That she is not Kimball's widow, and has no right to administer on his estate, and that the Surrogate was right in denying her motion.

Adams vs. Adams, 154 Mass., 290.

It is respectfully submitted that the order of the Court below should be affirmed.

LEMUEL H. ARNOLD,
For Defendants in Error.